

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY RABY,

Defendant-Appellant.

UNPUBLISHED

April 15, 2010

No. 278617

Wayne Circuit Court

LC No. 07-004190-01

ON REMAND

Before: WILDER, P.J., and JANSEN and OWENS, JJ.

PER CURIAM.

In *People v Raby*, unpublished opinion per curiam of the Court of Appeals, issued April 15, 2008 (Docket No. 278617), we affirmed defendant's convictions for two counts of first-degree felony murder, MCL 750.316b, with the predicate felony of first-degree child abuse, MCL 750.136b(2), for each count. Following the United States Supreme Court's decision in *Melendez-Diaz v Massachusetts*, ___ US ___, 129 S Ct 2527; 174 L Ed 2d 314 (2009), and in lieu of granting leave to appeal, the Michigan Supreme Court vacated our opinion in part and remanded "for reconsideration of [] defendant's Confrontation Clause issue in light of *Melendez-Diaz*." *People v Raby*, 485 Mich 994; 775 NW2d 144 (2009). We again affirm.

In our previous opinion, we stated:

Defendant's convictions [arose] from the deaths of two young girls: Kyra Kinds, who was two years old, and Raven Raby, defendant's one-year-old daughter. On August 5, 2000, Kimberly Williams, Kyra[]'s aunt, found her dead body after returning from a party. At trial, Dr. Carl Schmidt, an expert forensic pathologist, testified that she died from blunt force trauma and shaken baby syndrome. He also testified that there was evidence that she had been sexually abused. At the time of Kyra[]'s death, defendant was the only male living in the home with her. Three years after Kyra[]'s death, on May 30, 2003, Nina Amos, Raven[]'s mother, found Raven's dead body. At trial, Dr. Schmidt testified that Raven also died of blunt force trauma, and likely also from shaken baby syndrome. [*Raby*, unpub op at 1.]

Autopsies were performed on Kyra's and Raven's bodies and the trial court admitted into evidence the autopsy reports prepared by nontestifying medical examiners through Dr. Schmidt's testimony. On remand, defendant argues that the admission of the autopsy reports violated his constitutional right to confront witnesses against him. We disagree. This issue is unpreserved and reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 263-764; 597 NW2d 130 (1999). Reversal is required

only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings," regardless of his innocence. [*People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004), quoting *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).]

The confrontation clause guarantees a criminal defendant the right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. Consequently, testimonial hearsay is inadmissible against a criminal defendant unless the declarant was unavailable at trial and there was a prior opportunity for cross-examination of the declarant. *Crawford v Washington*, 541 US 36, 50-51, 53-54; 124 S Ct 1074; 13 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). If the "primary purpose" of a statement or the questioning that elicits the statement "is to establish or prove past events potentially relevant to later criminal prosecution," the statement is testimonial. *Davis v Washington*, 547 U.S. 813, 822; 126 S Ct 2266, 2274; 165 L Ed 2d 244 (2006).

In our previous opinion, we stated that the principal purpose of the confrontation clause as explained in *Crawford* was to prevent the use of ex parte examinations against the accused. *Raby*, unpub op at 2. We concluded that "a medical examiner conducting an autopsy and preparing a report based on the autopsy is neither conducting nor being subject to a question and answer examination or other type of interrogation characteristic of taking testimony." Instead, in concluding that Kyra's autopsy report from 2000 was nontestimonial, we likened a "medical examiner's report of his own findings and conclusions" to a nontestimonial business record.

Our Supreme Court has instructed this Court to reconsider defendant's confrontation clause argument in light of *Melendez-Diaz*, which involved the use of affidavits by nontestifying laboratory analysts to support a defendant's convictions for distributing and trafficking in cocaine. *Id.* at ___, 129 S Ct at 2530-2531. The trial court admitted into evidence three notarized "certificates of analysis" from the nontestifying laboratory analysts who, at police request, tested the substance in bags seized by police. *Id.* The certificates identified the substance in the bags as cocaine. *Id.* A Massachusetts statute permitted the certificates to serve as "prima facie evidence of the composition, quality, and net weight of the narcotic" analyzed, and the Massachusetts courts held that the authors of such certificates were not subject to confrontation. *Id.* at ___, 129 S Ct 2531. The United States Supreme Court concluded that the certificates were affidavits, they constituted testimonial hearsay, and they were prepared for the "sole purpose" of establishing an element of the criminal charges against the defendant. *Id.* at ___, 129 S Ct 2532.

A constitutional claim based on *Melendez-Diaz*, which is analogous to the argument now raised by defendant, was recently addressed and rejected by this Court in *People v Lewis* (*On*

Remand), ___ Mich ___; ___ NW2d ___ (Docket No. 274508, issued January 12, 2010), slip op, pp 7-8. In *Lewis*, the trial court admitted into evidence the autopsy report prepared by two nontestifying medical examiners through the testimony of a third medical examiner, Dr. Carl Schmidt.¹ This Court distinguished the certificates of analysis in *Melendez-Diaz*, “which were prepared for the ‘sole purpose’ of providing ‘prima facie evidence’ against the defendant at trial,” from the autopsy report prepared by the nontestifying medical examiners, which was prepared pursuant to a duty imposed by statute. *Id.*, citing MRE 803(8) and MCL 52.202(1)(a) (a medical examiner shall investigate the cause and manner of death of an individual under certain circumstances, including death by violence). This Court reasoned:

“while it was conceivable that the autopsy report would become part of criminal prosecution, investigations by medical examiners are required by Michigan statute under certain circumstances regardless of whether criminal prosecution is contemplated.” [*Id.* at 8, quoting *People v Lewis*, unpublished opinion per curiam of the Court of Appeals, issued April 15, 2008 (Docket No. 274508), slip op, p 4.]

This Court further distinguished the certificates of analysis in *Melendez-Diaz* from the autopsy report in *Lewis* because “Dr. Schmidt formed independent opinions based on objective information in the autopsy report and his opinions were subject to cross-examination.” *Id.* Consequently, this Court concluded that the report was nontestimonial and the defendant was not denied his constitutional right to confront witnesses against him. *Id.*

Like the report in *Lewis*, the autopsy reports admitted into evidence here through Dr. Schmidt’s testimony were not prepared primarily for use in a later criminal prosecution. MRE 803(8); MCL 52.202(1)(a). Moreover, the reports contained objective information, from which Dr. Schmidt formed an independent opinion, and defendant was given the opportunity to cross-examine Dr. Schmidt regarding this independent opinion. *Lewis*, slip op, at 8. Therefore, we conclude that the autopsy reports were nontestimonial evidence and defendant was not denied the right to be confronted by the nontestifying medical examiners that prepared them. Accordingly, the trial court did not plainly err by admitting the autopsy reports at trial.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens

¹ Presumably, Dr. Schmidt is the same medical examiner that testified in this case.